NOT FOR PUBLICATION

NO. 25828

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

HOMAYON TAVAKOLI, M.D., KIHEI MEDICAL SERVICES, INC.,
AND URGENT CARE MAUI, INC.,
Plaintiffs-Appellants and Cross-Appellees,
v.
HAWAII MEDICAL SERVICE ASSOCIATION; HEALTH PLAN HAWAII,
Defendants-Appellees and Cross-Appellants,
and
JOHN DOES 1-99; JANE DOES 1-99; DOE ENTITIES 1-20;
AND DOE GOVERNMENTAL UNITS 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 02-1-0460(3))

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Plaintiffs-Appellants and Cross-Appellees Homayon Tavakoli, M.D. (Dr. Tavakoli), Kihei Medical Services, Inc. (KMSI) and Urgent Care Maui, Inc. (UCMI) (collectively referred to as Dr. Tavakoli/KMSI/UCMI) appeal from the Second Circuit Court's[1] April 17, 2003 "Order Granting in Part and Denying. . . in Part Defendants Hawaii Medical Service Association's and Health Plan Hawaii's Motion to Dismiss or . . . to Compel Individual Arbitration and Stay All Proceedings Filed January 31, 2003" (April 17, 2003 Order Denying Dismissal and Compelling Arbitration). This April 17, 2003 Order Denying Dismissal and Compelling Arbitration is an appealable collateral order. Association of Owners of Kukui Plaza v. Swinerton & Walberg Co., 68 Haw. 98, 107, 705 P.2d 28, 35 (1985). We vacate and remand for further proceedings consistent with this opinion.

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[1] The Honorable Joseph E. Cardoza presided.

On August 28, 2003, the Hawai'i Supreme Court dismissed, for lack of appellate jurisdiction, the May 22, 2003 cross-appeal by Defendants-Appellees and Cross-Appellants Hawaii Medical Service Association (HMSA) and Health Plan Hawaii (HPH) (collectively referred to as HMSA/HPH) from the April 17, 2003 Order Denying Dismissal and Compelling Arbitration and the April 17, 2003 "Order Denying Without Prejudice Defendants Hawaii Medical Service Association's and Health Plan Hawaii's Motion for Judgment on the Pleadings Filed January 31, 2003."[2]

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[2] In their cross-appeal, Defendants-Appellees and Cross-Appellants Hawaii Medical Service Association (HMSA) and Health Plan Hawaii (HPH) (collectively referred to as HMSA/HPH) presented the following two points of error. First, "[b]ecause it is undisputed that Plaintiffs[-Appellants and Cross-Appellees Homayon Tavakoli, M.D. (Dr. Tavakoli), Kihei Medical Services, Inc. (KMSI) and Urgent Care Maui, Inc. (UCMI) (collectively referred to as Dr. Tavakoli/KMSI/UCMI)] failed to timely pursue their administrative remedies required by contract, and the time to do so has now long expired, the Circuit Court should have granted the Motion to Dismiss and dismissed the Complaint with prejudice." Second, the Circuit Court should have granted HMSA/HPH's Motion for Judgment on the Pleadings seeking a ruling that the claims asserted by Dr. Tavakoli/KMSI/UCMI were substantially defective and should be dismissed with prejudice.

More specifically, HMSA/HPH contended:

1. The circuit court should have ruled on the merits of Dr. Tavakoli/KMSI/UCMI's claims pursuant to Association of Owners of Kukui Plaza v. Swinerton, et al.

2. Counts I, II, III, and XI of Dr. Tavakoli/KMSI/UCMI's complaint should have been dismissed for lack of standing.

3. Count XI of Dr. Tavakoli/KMSI/UCMI's complaint should have been dismissed as barred by public policy.

4. Counts IV, IX, and XVI of Dr. Tavakoli/KMSI/UCMI's complaint should have been dismissed for lack of a predicate insurance contract.

5. Counts VI, VII, VIII, and IX of Dr. Tavakoli/KMSI/UCMI's complaint should have been dismissed for lack of privity of contract.

6. Count XII of Dr. Tavakoli/KMSI/UCMI's complaint should have been dismissed for failure to plead prospective contractual relationship.

7. Count XIII of Dr. Tavakoli/KMSI/UCMI's complaint should have been dismissed for failure to plead an identifiable prospective economic advantage.

HMSA/HPH were not specific regarding counts V, X, XIV, and XV.

BACKGROUND

The complaint filed on September 20, 2002 by Dr. Tavakoli/KMSI/UCMI alleges that KMSI and UCMI operate through "associate physicians employed to work at the satellite clinics[.]" Neither the complaint nor the record explains the details of this alleged employment. Dr. Tavakoli and the associate physicians of KMSI/UCMI had a contractual business relationship with HMSA/HPH whereby they provided medical treatment for HMSA/HPH's subscribers and their affiliates in the Blue Cross Blue Shield Association. Under the pertinent Participating Physician Agreement (PPA), in exchange for providing care for the subscribers of HMSA/HPH, Dr. Tavakoli and the associate physicians of KMSI/UCMI accepted assignment of benefits from the subscribers of HMSA/HPH. Approximately 70% of Dr. Tavakoli/KMSI/UCMI's revenue was generated by the services they provided to patients covered by the HMSA/HPH's assorted insurance and health maintenance organization plans.

Dr. Tavakoli and HMSA/HPH entered into a PPA prior to November 19, 1997 (First PPA). Thereafter, Dr. Tavakoli informed HMSA/HPH that, effective November 19, 1997, he would not be an HMSA/HPH provider.

According to Wendy Takara (Takara), the custodian of HMSA/HPH's records, the associate physicians of KMSI and UCMI entered into PPAs substantially similar to the First PPA. She noted that "the specific terms of [each PPA] may vary depending on a variety of factors[.]" She did not describe the details of

these variances or factors. These First PPAs were terminated when HMSA/HPH entered into a second PPA (Second PPA) with the associate physicians of KMSI and UCMI effective January 31, 1998. Dr. Tavakoli did not enter into a Second PPA with HMSA/HPH.

On November 9, 1999, effective October 26, 1999, Dr. Tavakoli entered into the third PPA (Third PPA) with HMSA/HPH. Amendments to that Third PPA were made on November 30, 1999 (effective January 31, 2000) (First Amendment) and June 15, 2000 (effective September 1, 2000) (Second Amendment).

According to Takara, the associate physicians of KMSI and UCMI entered into PPAs and amendments with HMSA/HPH substantially similar to the Third PPA, the First Amendment, and the Second Amendment, thereby terminating their Second PPAs.

The Third PPA has a two-page, single-spaced table of contents and ten pages of single-spaced substance. The Third PPA covers the following Articles:

Article I - Definitions

Article II - Obligations of Participating Physician

Article III - Obligations of HMSA

Article IV - Compensation

Article V - Records

Article VI - Insurance

Article VII - Term and Termination

Article VIII - Dispute Resolution

Article IX - Miscellaneous Provisions[3]

The Dispute Resolution article in the Third PPA states, in relevant part:

8.1 Administrative Appeal.

(a) Disputes Other Than Termination (Section 7.2) or Immediate Termination (Section 7.3) of This Agreement. If Participating Physician disagrees with a decision by HMSA, Participating Physician shall submit a written request for review by an HMSA review committee composed of practicing physicians within one year of Participating Physician's receipt of notice of such decision. Participating Physician may appear to present evidence or testimony before a review committee.

(b) Termination of This Agreement. Participating Physician shall submit a written request for appeal within 60 calendar days of receipt of a notice of termination from HMSA. A review committee composed of practicing physicians shall convene within 30 calendar days of the request for appeal. Participating Physician may appear to present evidence or testimony before the committee. Participating Physician will be notified of the review committee's decision within five working days following the hearing.

8.2 Expedited Benefits Redetermination. Participating Physician may request an expedited redetermination of any HMSA decision to deny payment for a service that has not yet been provided to a Member. Participating Physician shall request an expedited redetermination and provide any additional information requested by HMSA. HMSA shall provide a decision in accord with national timeliness standards set forth in the Provider Handbook. If Participating Physician disagrees with the expedited redetermination decision, Participating Physician shall request an appeal in accord with Section 8.1(a) above.

8.3 Arbitration Upon Exhaustion of Administrative Appeal. HMSA and Participating Physician agree that, except for disputes related to HMSA's Schedule of Maximum Allowable Charges, any and all claims, disputes, or causes of action arising out of this Agreement or its performance, or in any way related to

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[3] Section 9.1 of this third Participating Physician Agreement states as follows:

Amendments. After consultation with an HMSA advisory committee composed of practicing physicians, HMSA may amend this Agreement by providing 60 calendar days' written notice to Participating Physician. Failure of Participating Physician to object in writing within 30 calendar days following receipt of notice of the proposed change shall constitute Participating Physician's acceptance thereof. Amendments to this Agreement initiated by the Participating Physician may be made by mutual written consent of HMSA and Participating Physician.

this Agreement or its performance, including but not limited to any and all claims, disputes, or causes of action based upon contract, tort, statutory law, or actions in equity, shall be resolved by binding arbitration as set forth in this Agreement.

Within 30 calendar days following Participating Physician's exhaustion of administrative remedies described in Sections 8.1 [Administrative Appeal] and 8.2 [Expedited Benefits Redetermination] above, Participating Physician shall submit a written request for arbitration to Legal Services at HMSA in Honolulu, Hawaii. The arbitration shall be conducted in accord with Commercial Arbitration Rules of the American Arbitration Association, or its successor, and Hawaii Revised Statutes, Chapter 658.

HMSA and Participating Physician shall promptly appoint a single arbitrator. Should both parties fail to agree on a single arbitrator within 30 calendar days of Participating Physician's request for arbitration, either party may apply to the First Circuit Court, State of Hawaii, for appointment of an arbitrator. Both parties shall share the arbitrator's fee equally. All other costs of the arbitration will be paid as ordered by the arbitrator, except that each party will pay its own attorney and witness fees. The decision of the arbitrator shall be final and binding on both parties.

The Miscellaneous Provisions article in the Third PPA states, in relevant part:

9.1 Amendments. After consultation with an HMSA advisory committee composed of practicing physicians, HNSA may amend this Agreement by providing 60 calendar days' written notice to Participating Physician. Failure of Participating Physician to object in writing within 30 calendar days following receipt of notice of the proposed change shall constitute Participating Physician's acceptance thereof. Amendments to this Agreement initiated by the Participating Physician may be made by mutual written consent of HMSA and Participating Physician.

9.2 Assignment. Neither HMSA nor Participating Physician shall assign or transfer rights, duties, or obligations under this Agreement without the prior written consent of the other party.

9.3 Captions. The captions contained herein are for reference purposes only and shall not affect the meaning of this Agreement.

9.4 Cooperation of Parties. Participating Physician and HMSA agree to meet and confer in good faith on common problems including, but not limited to, those pertaining to Member complaints, customer service, utilization of services, credentialing, authorization, claims and reporting procedures, and information and forms provided to Participating Physician for use with Members.

9.5 Entire Agreement. This Agreement, together with Plan Documents and the Provider Handbook as amended from time to

time, contains the entire agreement between the parties and supersedes all prior agreements and negotiations, either oral or in writing, with respect to the subject matter hereof.

With additions bolded and deletions bracketed, the First Amendment amended the Dispute Resolution article in the Third PPA as follows:

8.1 Administrative Appeal.

(a) Disputes Other Than Termination (Section 7.2) or Immediate Termination (Section 7.3) of This Agreement. If Participating Physician disagrees with a decision by HMSA, Participating Physician shall submit a written request for review by an HMSA review committee composed of practicing physicians within one year of Participating Physician's receipt of notice of such decision. **The review committee shall convene within 60 calendar days of HMSA's receipt of the request for review.** Participating Physician may appear to present evidence or testimony before a review committee. **Participating Physician will be notified of the review committee's decision within 10 working days following the hearing.**

(b) Termination of This Agreement. Participating Physician shall submit a written request for appeal within 60 calendar days of receipt of a notice of termination from HMSA. A review committee composed of practicing physicians shall convene within 30 calendar days of the request for appeal. Participating Physician may appear to present evidence or testimony before the committee. Participating Physician will be notified of the review committee's decision within five working days following the hearing.

(c) Neither HMSA nor Participating Physician shall be represented by an attorney or other representative at the administrative appeal. Both HMSA and Participating Physician may be represented by counsel or another representative at arbitration in accord with Section 8.3 below.

8.2 Expedited Benefits Redetermination. Participating Physician may request an expedited redetermination of any HMSA decision to deny payment for a service that has not yet been provided to a Member. Participating Physician shall request an expedited redetermination and provide any additional information requested by HMSA. HMSA shall provide a decision in accord with national timeliness standards set forth in the Provider Handbook. If Participating Physician disagrees with the expedited redetermination decision, Participating Physician shall request an appeal in accord with Section 8.1(a) above.

8.3 Arbitration Upon Exhaustion of Administrative Appeal. HMSA and Participating Physician agree that, except for disputes related to HMSA's Schedule of Maximum Allowable Charges, any

and all claims, disputes, or causes of action arising out of this Agreement or its performance, or in any way related to this Agreement or its performance, including but not limited to any and all claims, disputes, or causes of action based upon contract, tort, statutory law, or actions in equity, shall be resolved by binding arbitration as set forth in this Agreement.

Within 30 calendar days following Participating Physician's exhaustion of administrative remedies described in Sections 8.1 and 8.2 above, Participating Physician shall submit a written request for arbitration to Legal Services at HMSA in Honolulu, Hawaii. **The arbitration shall be conducted by an independent arbitration service mutually selected by HMSA and Participating Physician, except that if a service is not mutually selected within 30 calendar days from HMSA's receipt of Participating Physician's request for arbitration, HMSA shall select the arbitration service.** The arbitration shall be conducted in accord with [Commercial Arbitration Rules of the American Arbitration Association, or its successor, and] Hawaii Revised Statutes, Chapter 658.

HMSA and Participating Physician shall promptly appoint a single arbitrator **in accord with procedures of the arbitration service selected above.** [Should both parties fail to agree on a single arbitrator within 30 calendar days of Participating Physician's request for arbitration, either party may apply to the First Circuit Court, State of Hawaii, for appointment of an arbitrator.] Both parties shall share the arbitrator's fee equally. All other costs of the arbitration will be paid as ordered by the arbitrator, except that each party will pay its own attorney and witness fees. The decision of the arbitrator shall be final and binding on both parties.

8.4 Disputes Related to HMSA's Schedule of Maximum Allowable Charges. The determination of charges in HMSA's Schedule of Maximum Allowable Charges shall be made at HMSA's sole discretion. Participating Physician's right to review and arbitration does not include the right to contest any charge included in HMSA's Schedule of Maximum Allowable Charges.

With additions bolded and deletions bracketed, the Second Amendment amended the Dispute Resolution article in the Third PPA, as amended by the First Amendment, as follows:

8.1 Administrative Appeal.

(a) Disputes Other Than Termination (Section 7.2) or Immediate Termination (Section 7.3) of This Agreement. If Participating Physician disagrees with a decision by HMSA, Participating Physician shall submit a written request for review by an HMSA review committee composed of practicing physicians within one year of Participating Physician's receipt of notice of such decision. The review committee shall convene within 60 calendar days of HMSA's receipt of the request for review. Participating Physician **and one other witness who is also a physician** may appear to present evidence

or testimony before a review committee. Participating Physician will be notified of the review committee's decision within 10 working days following the hearing.

(b) Termination of This Agreement. Participating Physician shall submit a written request for appeal within 60 calendar days of receipt of a notice of termination from HMSA. A review committee composed of practicing physicians shall convene within 30 calendar days of the request for appeal. Participating Physician may appear to present evidence or testimony before the committee. **Either party may, at its option, be represented by counsel or another representative at the appeal.** Participating Physician will be notified of the review committee's decision within five working days following the hearing.

(c) Neither HMSA nor Participating Physician shall be represented by an attorney or other representative at the administrative appeal **pursuant to this Section 8.1, except as provided in Section 8.1(b) above.** Both HMSA and Participating Physician may be represented by counsel or another representative at arbitration in accord with Section 8.3 below.

8.2 Expedited Benefits Redetermination. Participating Physician may request an expedited redetermination of any HMSA decision to deny payment for a service that has not yet been provided to a Member. Participating Physician shall request an expedited redetermination and provide any additional information requested by HMSA. HMSA shall provide a decision in accord with national timeliness standards set forth in the Provider Handbook. If Participating Physician disagrees with the expedited redetermination decision, Participating Physician shall request an appeal in accord with Section 8.1(a) above.

8.3 Arbitration Upon Exhaustion of Administrative Appeal. HMSA and Participating Physician agree that, except for disputes related to HMSA's Schedule of Maximum Allowable Charges, any and all claims, disputes, or causes of action arising out of this Agreement or its performance, or in any way related to this Agreement or its performance, including but not limited to any and all claims, disputes, or causes of action based upon contract, tort, statutory law, or actions in equity, shall be resolved by binding arbitration as set forth in this Agreement.

Within 30 calendar days following Participating Physician's exhaustion of administrative remedies described in Sections 8.1 and 8.2 above, Participating Physician shall submit a written request for arbitration to Legal Services at HMSA in Honolulu, Hawaii. The arbitration shall be conducted by an independent arbitration service mutually selected by HMSA and Participating Physician[, except that if a service is not mutually selected within 30 calendar days from HMSA's receipt of Participating Physician's request for arbitration, HMSA shall select the arbitration service. The arbitration shall be conducted in accord with Hawaii Revised Statutes, Chapter 658]. **If HMSA and Participating Physician are unable to agree upon an arbitration service within 30 calendar days of HMSA's receipt of Participating Physician's**

request for arbitration, Dispute Prevention and Resolution, Inc., shall conduct the arbitration.

[HMSA and Participating Physician shall promptly appoint a single arbitrator in accord with procedures of the arbitration service selected above. Both parties shall share the arbitrator's fee equally. All other costs of the arbitration will be paid as ordered by the arbitrator, except that each party will pay its own attorney and witness fees.] **The arbitration shall be conducted by a single arbitrator in accord with the rules of the arbitration service selected above and Hawaii Revised Statutes, Chapter 658. Each party will pay its own attorney and witness fees. Fees and costs of the arbitrator and the arbitration service may be awarded by the arbitrator as the arbitrator determines is appropriate. If no award is made, fees and costs of the arbitrator and the arbitration service shall be shared equally by both parties.** The decision of the arbitrator shall be final and binding on both parties.

8.4 Disputes Related to HMSA's Schedule of Maximum Allowable Charges. **Participating Physician may submit a written request for a review of a specific Eligible Charge by HMSA staff. If the participating Physician disagrees with the staff's review decision, Participating Physician must submit within 60 calendar days of Participating Physician's receipt of the HMSA staff review decision a written request for review by the HMSA review committee. The HMSA fee review committee shall be composed of practicing physicians and may submit recommendations for consideration by HMSA.** The determination of charges in HMSA's Schedule of Maximum Allowable Charges shall be at HMSA's sole discretion. Participating Physician's right to [review and]arbitration does not include the right to contest any charge included in HMSA's Schedule of Maximum Allowable Charges **or the fee review process.**

On September 20, 2002, Dr. Tavakoli/KMSI/UCMI filed a forty-page, sixteen count complaint against HMSA/HPH. This complaint alleged that "[o]n May 4, 2001, [HMSA/HPH] breached the [Third] PPA by wrongfully terminating Dr. Tavakoli's participation, effective July 15, 2001[.]" It further alleged that HMSA/HPH used its unlawful monopoly and monopsony[4] powers to force Dr. Tavakoli/KMSI/UCMI to stop providing extended hour

[4] A "monopsony" is defined as, "A market situation in which the product or service of several sellers is sought by only one buyer." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (1969).

emergency care and to close two satellite medical clinics[5], and that HMSA/HPH prevented Dr. Tavakoli/KMSI/UCMI from opening two additional clinics. Dr. Tavakoli/KMSI/UCMI alleged that HMSA/HPH accomplished these results

> 2. . . . by interfering with [Dr. Tavakoli/KMSI/UCMI's] relationships with associate physicians employed to work at the satellite clinics; driving patients away from [Dr. Tavakoli/KMSI/UCMI's] clinics through schemes that improperly and unfairly shift the costs for medically necessary care from [HMSA/HPH] to their subscribers; and depriving [Dr. Tavakoli/KMSI/UCMI] of their rightful property through a collection of claims-processing schemes designed to harass [Dr. Tavakoli/KMSI/UCMI], unfairly and improperly shifting to [Dr. Tavakoli/KMSI/UCMI] costs of care [HMSA/HPH] promised to pay for on behalf of their subscribers under their various plans.
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> . . . .
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> 5. Defendant HMSA profits by erecting barriers to convenient after-hours health care in the Kihei-Wailea community because erecting barriers to accessing care -- known as "gate-keeping" -- reduces claims for benefits.

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[5] In their complaint, Dr. Tavakoli/KMSI/UCMI alleged, in relevant part, as follows:

> 38. Dr. Tavakoli and the KMSI and UCMI associate physicians practice medicine outside the Kaiser HMO system.
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> 39. Dr. Tavakoli and KMSI began operating an emergency care clinic in the Kihei, Maui area in approximately 1991, providing medical services to Kihei and other towns along the coastline from Olowalu to Makena. In February 1992, Dr. Tavakoli provided urgent care for a young patient on Sunday when he happened to be in his clinic. At that time, only the emergency room at Maui Memorial Medical Center provided urgent care after hours and on weekends. All of the medical offices and clinics on Maui were open 9:00 a.m. until 5:00 p.m., Monday through Friday. The mother's exorbitant thanks for the prompt care Dr. Tavakoli provided her child, inspired Dr. Tavakoli to extend the clinic's hours to include weekends, and eventually evenings. In approximately 1997, [Dr. Tavakoli/KMSI/UCMI] further expanded their clinic hours to provide emergency/urgent care from 7:00 [a.m.] - 11:00 p.m. 365 days per year. [Dr. Tavakoli/KMSI/UCMI] were the only extended after hours medical service in the Kihei-Wailea area open during the hours from 7:00 [a.m.] to 11:00 p.m.
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> 40. In approximately August 1995, KMSI opened two satellite clinics, one at Dolphin Plaza and another at the Kea Lani Hotel. KMSI also had negotiated for leases on offices for clinics in Lahaina and Kahului, which it was prevented from finalizing because [HMSA/HPH] were engaging in various claims-processing schemes to reduce and/or evade claims payments they owed to KMSI.

6. Defendant HMSA also profits by destroying the medical practices of physicians competing with Maui Medical Group ("MMG"), because Defendant HMSA has a substantial financial stake in MMG.

7. Defendant HMSA retaliated egregiously against [Dr. Tavakoli/KMSI/UCMI] because they refused to surrender to [HMSA/HPH's] oppression and reduce their extended hours. [HMSA/HPH] wrongfully terminated [HMSA/HPH's] contracts with [Dr. Tavakoli/KMSI/UCMI] for non-material reasons, ...

. . . .

9. [HMSA/HPH] have used approximately two dozen different schemes to systematically deny, delay and diminish payments properly due for benefits claimed by [HMSA/HPH's] subscribers or by [Dr. Tavakoli/KMSI/UCMI], through assignments by [HMSA/HPH's] subscribers ("Affected Claims"), in an overall pattern of unlawful and bad faith activity.

10. [HMSA/HPH] routinely employ the mails and telephone services in implementing their various schemes to deny Affected Claims or delay or diminish payments properly due on Affected Claims.

Counts I, II, and III of the complaint alleged a violation of the following statutes:

Count I	Hawaii Revised Statutes (HRS) § 480-2(a) (Supp. 2002)[6]
Count II	HRS § 481-1 (1993)[7]

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[6] **§ 480-2 Unfair competition, practices, declared unlawful.** (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

(b) In construing this section, the courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) No showing that the proceeding or suit would be in the public interest (as these terms are interpreted under section 5(b) of the Federal Trade Commission Act) is necessary in any action brought under this section.

(d) No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section.

(e) Any person may bring an action based on unfair methods of competition declared unlawful by this section.

[7] **§ 481-1 Unlawful practices.** It shall be unlawful for any person, firm, or corporation, doing business in the State and engaged in the production, manufacture, distribution, or sale of any commodity, or product, or service, or output of a service trade, of general use or consumption, or the product or service of

Count III HRS § 481A-3 (1993).[8]

any public utility, with the intent to destroy the competition of any regular established dealer in the commodity, product, or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities, or cities or portions thereof, or between different locations in such sections, communities, cities, or portions thereof in this State, by selling or furnishing the commodity, product, or services at a lower rate in one section, community, or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or a commodity, or from the point of manufacture if a manufactured product or commodity, and in the overhead cost.

Motion picture films when delivered under a lease to motion picture houses shall not be deemed to be a commodity or product of general use, or consumption, under this part. This part shall not be construed to prohibit the meeting in good faith of the rates of a competitor as herein defined, selling the same article or product, or service or output of a service trade in the same locality or trade area, or to prevent a reasonable classification of service by public utilities for the purpose of establishing rates.

The inhibition hereof against locality discrimination embraces any scheme of special rebates, collateral contracts, or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this part.

[8] **[§ 481A-3] Deceptive trade practices.** (a) A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person:

(1) Passes off goods or services as those of another;
(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
(3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
(4) Uses deceptive representations or designations of geographic origin in connection with goods or services;
(5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;
(6) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

In relevant part, Count I alleged the following specifics:

> 149. . . . Defendant HMSA competes with [Dr. Tavakoli/KMSI/UCMI] through its substantial investment in MMG, which constitutes an incipient violation of antitrust law because MMG is the largest competitor on Maui and its association with HMSA affords it significant competitive advantages in terms of claims processing and financial support, and HMSA's ability to encourage subscribers to choose MMG over its competitors by processing claims more efficiently and approving care, as well as encouraging use of MMG through direct advertising and advertising support.
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> 150. . . . [HMSA/HPH] have engaged in various policies and practices in respect of its subscribers interfering with their disposition to seek care from [Dr. Tavakoli/KMSI/UCMI].
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> 151. . . . [HMSA/HPH] have wrongfully interfered with [Dr. Tavakoli/KMSI/UCMI's] relationships with their associate physicians.
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> 152. [HMSA/HPH's] conduct has been substantially injurious to consumers because it has increased the cost of obtaining urgent care for most of the residents and visitors in the Kihei-Wailea community area.
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> 153. [HMSA/HPH's] oppression of Dr. Tavakoli is offensive to established public policy against the flagrant oppression of the weak by the strong.

In relevant part, Count II alleged the following specifics:

> (7) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
> (8) Disparages the goods, services, or business of another by false or misleading representation of fact;
> (9) Advertises goods or services with intent not to sell them as advertised;
> (10) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
> (11) Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or
> (12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.
>
> (b) In order to prevail in an action under this chapter, a complainant need not prove competition between the parties or actual confusion or misunderstanding.
>
> (c) This section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this State.

> 158. [HMSA/HPH] discriminated against their subscribers and BCBS [Blue Cross Blue Shield] Visitors, who collectively constitute a majority in the Kihei-Wailea community area, by making
>
> a) access to after hours urgent care more difficult and expensive than for residents of Kahului-Wailuku community and the surrounding communities, and
>
> b) the cost of after hours urgent care obtained from [Dr. Tavakoli/KMSI/UCMI's] clinics higher than the cost paid by residents of Kahului-Wailuku community and the surrounding communities accessing care at MMMC [Maui Memorial Medical Center] Emergency Dept.
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> 159. [HMSA/HPH] withheld participation and/or delayed processing applications for Dr. Tavakoli and [KMSI/UCMI's] associate physicians to participate in [HMSA/HPH's] plans.

In relevant part, Count III alleged the following specifics:

> 163. [HMSA/HPH], in the course of their business, disparaged [Dr. Tavakoli/KMSI/UCMI's] services and business by false and misleading representations of fact . . . in violation of H.R.S. § 481A-3(a)(8) and the related statutes.
>
> 164. By reason of [HMSA/HPH's] acts and omissions . . . [Dr. Tavakoli/KMSI/UCMI] have lost opportunities, lost revenues and income, and experienced pain and suffering, and have been damaged thereby and are entitled to damages in such amounts as shall be proven at trial.
>
> 165. [Dr. Tavakoli/KMSI/UCMI] are entitled, pursuant to H.R.S. § 481A-4, to an injunction enjoining and restraining [HMSA/HPH] from disparaging [Dr. Tavakoli/KMSI/UCMI] and their business to [HMSA/HPH's] subscribers, including but not limited to sending letters and/or notices to [HMSA/HPH's] subscribers urging them to switch to a participating provider, and disparaging [Dr. Tavakoli/KMSI/UCMI] to possible referral sources.
>
> 166. Pursuant to H.R.S. § 481A-4, [Dr. Tavakoli/KMSI/UCMI] are also entitled to an award of their attorneys' fees and costs.

Counts IV and V asserted bad faith and unjust enrichment for "failing to pay insured benefits to the insured's lawful assignee," and alleged that Dr. Tavakoli/KMSI/UCMI "are the lawful assignees of the unpaid benefits and benefits which were only partially paid or paid after unreasonable delay[.]"

Counts VI and VII alleged breach of contract under the First PPA. In relevant part, Count VII alleged the following specifics:

> 195. [HMSA/HPH] breached the 1st PPA arbitration agreement by unreasonably demanding unconscionable rules for the arbitration and alleging an interpretation that rendered the arbitration agreement unconscionable as a matter of law.
>
> 196. By reason of [HMSA/HPH's] conduct as set forth above, the arbitration agreement in the 1st PPA is not enforceable by [HMSA/HPH], rendering none of the Affected Claims herein subject to arbitration.

Count VIII alleged a breach of contract under the Third PPA.

Count IX alleged a breach of an implied covenant of good faith under the First PPA and the Second PPA.

Under the heading "Promissory Estoppel", Count X alleged that Dr. Tavakoli/KMSI/UCMI "have been injured in their business and property as a result of their reasonable detrimental reliance that [HMSA/HPH] would treat them fairly."

Count XI sought injunctive relief requiring HMSA/HPH "to restore Dr. Tavakoli's privileges and to cease and desist from further unfair acts against [Dr. Tavakoli/KMSI/UCMI] . . . ; and to treat [Dr. Tavakoli/KMSI/UCMI] as an emergency provider in processing claims."

Count XII alleged that Dr. Tavakoli/KMSI/UCMI "entered into agreements with physicians to associate with [Dr. Tavakoli/KMSI/UCMI's] clinics and provide medically necessary services to [Dr. Tavakoli/KMSI/UCMI's] patients" and that HMSA/HPH tortiously interfered with Dr. Tavakoli/KMSI/UCMI's agreements with those associate physicians.

Under the heading of "Tortious Interference with Economic Advantage", Count XIII alleged that HMSA/HPH "retaliated against their subscribers who seek care from

[Dr. Tavakoli/KMSI/UCMI] by denying and/or reducing their benefits and/or harassing the subscribers with more paperwork than subscribers are required to submit in order to have their claims paid by any other non-participating provider."

Count XIV alleged that the actions of HMSA/HPH deprived Dr. Tavakoli of his rights to due process and his common law rights to fair procedure.

The complaint alleged, in relevant part, as follows:

> 112. On May 4, 2001, [HMSA/HPH] breached the [Third] PPA by wrongfully terminating Dr. Tavakoli's participation, effective July 15, 2001[.]

Count XV alleged, in relevant part, as follows:

> 265. In April 2000, [Dr. Tavakoli/KMSI/UCMI] made Defendant HMSA aware of their plan to remain open for business 24 hours per day, 365 days per year. Shortly thereafter, [HMSA/HPH] terminated Dr. Tavakoli's participation without justification.

Count XV alleged that the termination of Dr. Tavakoli's Third PPA was an unlawful retaliatory act.

Count XVI alleged that the wrongful conduct of HMSA/HPH "was unwarranted and unjustified under the circumstances, and intentionally caused [Dr. Tavakoli/KMSI/UCMI] harm, or was knowingly undertaken without regard to the harm [Dr. Tavakoli/KMSI/UCMI] might suffer as a result" and, therefore, was a "Prima Facie Tort" warranting an award of punitive damages.

The complaint prayed for the following:

1. A declaration that HMSA/HPH have violated HRS §§ 480-2(a) ("claims-processing schemes and other schemes"), 481-1 ("increased the cost of emergency and urgent care services to Kihei-Wailea community residents and visitors by withholding

participation from Dr. Tavakoli and [Dr. Tavakoli/KMSI/UCMI's associate physicians]"), and 481A-3 ("disparaging [Dr. Tavakoli/KMSI/UCMI's] claims processing and administration, and by sending notices to [HMSA/HPH's] subscribers urging them to switch from [Dr. Tavakoli/KMSI/UCMI] to a participating provider").

2. An injunction

prohibiting, restraining, and enjoining [HMSA/HPH] from engaging in the conduct complained of herein, including enjoining [HMSA/HPH]

i) To process [Dr. Tavakoli/KMSI/UCMI's] claims for services provided during [Dr. Tavakoli/KMSI/UCMI's] extended after-hours as claims by an emergency care provider;

ii) From reducing or denying reimbursements to [Dr. Tavakoli/KMSI/UCMI] without proof that the services provided were not medically necessary;

iii) From bundling claims for separate procedures, depriving [Dr. Tavakoli/KMSI/UCMI] their rightful reimbursements for separate medically necessary services provided contemporaneously;

iv) From downcoding procedure codes for services provided by [Dr. Tavakoli/KMSI/UCMI];

v) From failing to properly reimburse [Dr. Tavakoli/KMSI/UCMI] by requiring them to incur costs submitting excessive documentation justifying [Dr. Tavakoli/KMSI/UCMI's] claims;

vi) From otherwise interfering with or obstructing [Dr. Tavakoli/KMSI/UCMI's] rights to full and timely reimbursement;

vii) From violating the Hawai'i Prompt Claims Payment Act, sections 431:13-108, et. seq. requiring timely payment of claims, and interest for late payments;

viii) From creating barriers to accessing care by abusing the peer review process and/or withholding or delaying participation to Dr. Tavakoli and [Dr. Tavakoli/KMSI/UCMI's] associate physicians;

ix) From failing to provide timely and accurate information to [Dr. Tavakoli/KMSI/UCMI] about claims in process;

x) To provide appropriate, adequate, and accurate information sufficient to permit [Dr. Tavakoli/KMSI/UCMI] and their staff to mirror the claims information on in [sic] their accounting system without expending unreasonable amounts of time and resources in attempting [to] research information and/or obtain [Dr. Tavakoli/KMSI/UCMI's] rightful reimbursement;

xi) To provide adequate explanations for any claims [HMSA/HPH] deny;

xii) To provide sufficient staff and resources to timely process HPH members' requests for pre-authorization to receive urgent care at [Dr. Tavakoli/KMSI/UCMI's] clinics after hours; and

> xiii) From paying lower reimbursements and requiring different benefits and co-payments when [HMSA/HPH's] subscribers seek care from a non-participating physicians [sic] when subscribers are reasonably justified in seeking care from such physicians, and/or when such discriminatory reimbursements would lead to unjustifiably higher costs for care in one community than in another; discriminatory pricing or costs[;]

3. Special and general damages for lost opportunities, lost income, damages to Dr. Tavakoli/KMSI/UCMI's business and property, disparagement and damage to reputation.

4. Treble damages pursuant to HRS § 480-13.

5. Punitive damages.

6. Attorney fees and costs pursuant to HRS §§ 480-13 and 481A-4.

7. Any and all other relief that the court deems just and proper.

HMSA/HPH answered the complaint on November 12, 2002, and asserted various affirmative defenses including the following:

> 2. The claims are subject to binding arbitration.
>
> 3. [Dr. Tavakoli/KMSI/UCMI] do not have standing to pursue remedies under Haw.Rev.Stat. Chapters 480, 481 and 481A because they are not consumers nor competitors with [HMSA/HPH], and they do not have a private right of action for the alleged claims under Haw.Rev.Stat. Chapters 480, 481 and 481A.

On January 31, 2003, HMSA/HPH filed two motions: 1) Defendants Hawaii Medical Service Association and Health Plan Hawaii's Motion for Judgment on the Pleadings (Motion for Judgment on the Pleadings), and 2) Defendants Hawaii Medical Service Association's and Health Plan Hawaii's Motion to Dismiss or in the Alternative, to Compel Individual Arbitration and Stay All Proceedings (Motion to Dismiss or to Compel Arbitration). In

footnote 14 of a memorandum accompanying the first motion, HMSA/HPH noted that "H.R.S. Ch. 480 was amended effective July 2002 to permit private claims for unfair methods of competition, but the events in the Complaint predate this law. The new law does not apply retroactively. *See* H.R.S. §1-3." Act 229, Session Laws of Hawaii 2002, took effect upon its approval on June 28, 2002.

The two motions were heard on March 28, 2003. On April 17, 2003, the Second Circuit Court entered the Order Denying Dismissal and Compelling Arbitration. In relevant part, the court's ruling stated:

> IT IS HEREBY ORDERED THAT:
>
> A. [HMSA/HPH's] Motion to Dismiss or in the Alternative, to Compel Individual Arbitration and Stay All Proceedings ("Motion") is hereby GRANTED, as follows:
>
> (1) The questions before this Court are the enforceability of an Arbitration Agreement (Par. 8.3 of HMSA's Participating Physician Agreements) and the scope of that Arbitration Agreement as it relates to the Complaint filed in this action.
>
> (2) The Arbitration Agreement is signed, valid, binding and enforceable in all respects.
>
> (3) All claims presented in this action are subject to (and within the scope of) the Arbitration Agreement.
>
> (4) Consolidation of parties in arbitration is prohibited.[9]
>
> (5) Physicians who wish to pursue any of the claims presented in this action may do so only by initiating individual binding arbitration in accordance with the terms of the Arbitration Agreement.[10]
>
> (6) All proceedings in this action are stayed pending

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[9] The court did not explain its basis for this order.

[10] The only physician who is a party to this action is Dr. Tavakoli.

> final resolution of any individual arbitration proceedings.[11]
>
> B. Insofar as [HMSA/HPH] sought dismissal of all claims in the Complaint based on allegations that [Dr. Tavakoli/KMSI/UCMI] failed to timely pursue and exhaust administrative remedies and failed to abide by binding arbitration procedures set forth in HMSA's Participating Physician Agreements, and other reasons contained in [HMSA/HPH's] Motion, the Motion is DENIED WITHOUT PREJUDICE. Therefore, all such issues and defenses may be raised by [HMSA/HPH] in the individual arbitration proceedings.

(Footnotes added.) On the same day, the court entered an order denying HMSA/HPH's Motion for Judgment on the Pleadings.

This case was assigned to this court on January 22, 2004.

APPELLATE JURISDICTION

HRS § 658A-3 (Supp. 2004) states as follows:

> **When chapter applies.** (a) Except as provided in subsection (c), this chapter governs an agreement to arbitrate made on or after July 1, 2002.
>
> (b) This chapter governs an agreement to arbitrate made before July 1, 2002, if all the parties to the agreement or to the arbitration proceeding so agree in a record. If the parties to the agreement or to the arbitration do not so agree in a record, an agreement to arbitrate that is made before July 1, 2002, shall be governed by the law specified in the agreement to arbitrate or, if none is specified, by the state law in effect on the date when the arbitration began or on June 30, 2002, whichever first occurred.
>
> (c) After June 30, 2004, this chapter governs an agreement to arbitrate whenever made.

HRS § 658A-3(c) does not apply to this appeal from the April 17, 2003 Order Denying Dismissal and Compelling Arbitration. The applicable law is the precedent that an order denying a Motion to Stay Proceedings Pending Arbitration and For Order Compelling Arbitration is an appealable collateral order. Association of Owners of Kukui Plaza, 68 Haw. at 107, 705 P.2d at 35.

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[11] The court did not specify any time limits.

APPELLANTS' POINTS OF ERROR

Dr. Tavakoli/KMSI/UCMI assert the following seven points of error on appeal:

1. The circuit court "failed to hold as a matter of law that [HMSA/HPH] waived enforcement of arbitration by electing to pursue judgment against all of [Dr. Tavakoli/KMSI/UCMI's] claims on their merits before seeking an order compelling arbitration."

2. The circuit court

> failed to hold as a matter of law that [HMSA/HPH] were in default of arbitration based on their 4-year uncured delay and bald pursuit of judgment by [t]he court against claims [Dr. Tavakoli/KMSI/UCMI] submitted for arbitration in 1998 because the evidence viewed in the light most favorable to [Dr. Tavakoli/KMSI/UCMI] was that [HMSA/HPH] delayed and frustrated [Dr. Tavakoli/KMSI/UCMI's] efforts to arbitrate until prospective costs of arbitration added to the cost of attempting to initiate arbitration exceeded the value of the claims, such that [Dr. Tavakoli/KMSI/UCMI] were forced to file the Complaint to preserve those claims.

3. "The circuit court erred by summarily disposing of [Dr. Tavakoli/KMSI/UCMI's] defenses based upon waiver and default, and failing to grant [Dr. Tavakoli/KMSI/UCMI's] demand for a jury trial [on] those issues because material facts were in dispute."

4. The circuit court erred

> when it concluded that all of [Dr. Tavakoli's] claims were subject to the arbitration provision . . . because the unambiguous language of the arbitration provision . . . excludes claims arising out of matters occurring prior to the effective date of [the Third PPA], and claims arising out of matters occurring subsequent to its termination.

5. The circuit court erred in concluding that KMSI and UCMI were subject to the arbitration provision "because [HMSA/HPH] admitted [KMSI and UCMI] were not parties to [the

Third PPA], and it was not shown that [Dr. Tavakoli] had authority to bind them to arbitration."

6. The circuit court erred

> when it held that the arbitration provision in [the Third PPA] was enforceable because the evidence that it was a contract of adhesion was uncontroverted, and [Dr. Tavakoli/KMSI/UCMI's] evidence viewed in the light most favorable to them was that the arbitration provision was decidedly one-sided both as written and as interpreted and enforced by [HMSA/HPH], and that it makes arbitrating claims so gravely difficult that, for all practical purposes, it deprives [Dr. Tavakoli/KMSI/UCMI] of their day in court.

7. The circuit court erred

> by denying [Dr. Tavakoli/KMSI/UCMI's] demand for a jury trial because it prevented them from discovering additional evidence to support their defense of unconscionability because there was evidence before the court suggesting the arbitration provision was one-sided by design.
>
> . . . .
>
> The arbitration provision requires [Dr. Tavakoli/KMSI/UCMI], but not [HMSA/HPH], to submit disputes to a panel [HMSA/HPH] controlled.

HMSA/HPH responded with its counter-statement of Dr. Tavakoli/KMSI/UCMI's points on appeal as follows:

1. "Did the Circuit Court properly determine that the arbitration agreement in HMSA's [PPA] Agreements is valid and binding?"

2. "Did the Circuit Court properly determine that all claims in the Complaint are subject to HMSA's arbitration agreement?"

RELEVANT STATUTES AND PRECEDENT

Pursuant to HRS § 658-3 (1993)[12],

[12] While Chapter 658 of the Hawaii Revised Statues (HRS) was repealed in 2001 and replaced with HRS Chapter 658A, the Uniform Arbitration Act, HRS § 658A-3 (Supp. 2004) states that "this chapter governs an agreement to arbitrate made on or after July 1, 2002." The arbitration agreement in the case at hand was entered into prior to July 1, 2002, and HRS Chapter 658 (1993) applies to it.

> [a] party aggrieved by the failure, neglect, or refusal of another to perform under an agreement in writing providing for arbitration, may apply to the circuit court for an order directing that the arbitration proceed in the manner provided for in the agreement. Five days' notice in writing of the application shall be served upon the party in default. Service thereof shall be made in the manner provided for service of a summons. The court shall hear the parties, and upon being satisfied that the making of the agreement or the failure to comply therewith is not in issue, the court hearing the application shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or the default is in issue, the court shall proceed summarily to the trial thereof.
>
> A jury trial may be demanded by either party before or at the time of the return and if such demand is made, the issue shall be tried before a jury, otherwise the court shall hear and determine the issue.

The Hawai'i Supreme Court has concluded that courts "can only decide, as a matter of law, whether to compel the parties to arbitrate their dispute if there is no genuine issue of material fact regarding the existence of a valid agreement to arbitrate." Koolau Radiology, Inc. v. Queen's Med. Ctr., 73 Haw. 433, 439, 834 P.2d 1294, 1298 (1992). More completely stated, the rule is that courts can decide as a matter of law only when there is no genuine issue of material fact regarding (a) the existence of a valid agreement to arbitrate, and (b) the default in proceeding with the arbitration. In such a situation, the standard for reviewing a petition to compel arbitration "is the same as that which would be applicable to a motion for summary judgment, and the trial court's decision is reviewed using the same standard employed by the trial court and based upon the same evidentiary materials as were before it in determination of the motion." Bronster v. United Pub. Workers, AFSCME, Local 646, AFL-CIO , 90 Hawai'i 9, 14, 975 P.2d 766, 771 (1999) (internal quotation marks and brackets omitted). There being no genuine

issue of material fact, our review of the April 17, 2003 Order Denying Dismissal and Compelling Arbitration is de novo. Id.; Brown v. KFC Nat'l Mgmt. Co., 82 Hawai'i 226, 231, 921 P.2d 146, 151 (1996); Lee v. Heftel, 81 Hawai'i 1, 3, 911 P.2d 721, 723 (1996); Koolau Radiology, 73 Haw. at 439-40, 834 P.2d at 1298. We must answer the following question of law: Is it right or is it wrong?

We recognize the sad truth that the preference by parties for arbitration over litigation has been substantially motivated by the many positives of arbitration and the many negatives of litigation, especially from the point of view of the stronger of the contracting parties. Now that many of the negatives of litigation are becoming negatives of arbitration, and arbitration is becoming more and more like litigation without some of the positives of litigation, many parties and some courts[13] are having second thoughts. Nevertheless, Hawai'i's courts have "long recognized the strong public policy supporting Hawai'i's arbitration statutes as codified in HRS Chapter 658. [The Hawai'i Supreme Court has] stated that the proclaimed public policy is to encourage arbitration as a means of settling differences and thereby avoiding litigation." Bateman Constr., Inc. v. Haitsuka Bros., Ltd., 77 Hawai'i 481, 484, 889 P.2d 58, 61 (1995) (internal quotation marks, ellipsis, and brackets omitted). If the parties have an enforceable agreement to

[13] Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159 (5th Cir. 2004); Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003).

arbitrate, "the court's power is limited by HRS Chapter 658." Id. Therefore "when presented with a motion to compel arbitration, the court is limited to answering two questions: 1) whether an arbitration agreement exists between the parties; and 2) if so, whether the subject matter of the dispute is arbitrable under such agreement." Koolau Radiology, 73 Haw. at 445, 834 P.2d at 1300. As recently noted by the Hawai'i Supreme Court in Luke v. Gentry Realty, Ltd., 105 Hawai'i 241, 249 n.12, 96 P.3d 261, 269 n.12 (2004),

> we share in the overwhelming support in this jurisdiction in favor of arbitration as a means of dispute resolution, *see, e.g.*, HRS § 658A-6(a) (Supp.2003) ("An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."); HRS § 658A-23 (Supp.2003) (describing specific and limited circumstances under which a court may vacate an arbitration award); Tatibouet[v. Ellsworth], 99 Hawai'i[226,] 234, 54 P.3d[397,] 405 [(2002)] ("It is well settled that the legislature overwhelmingly favors arbitration as a means of dispute resolution.").

DISCUSSION OF APPELLANTS' POINTS OF ERROR

A. Enforceability of an Arbitration Agreement

Dr. Tavakoli and HMSA entered into the First PPA and then, after a lapse of time, entered into the Third PPA. Both the First PPA and the Third PPA contain an arbitration clause. The Third PPA states that it "supersedes all prior agreements and negotiations, either oral or in writing, with respect to" its subject matter. Dr. Tavakoli and HMSA subsequently entered into a First Amendment to the Third PPA and thereafter entered into a Second Amendment to the Third PPA.

Associate physicians employed by KMSI and UCMI entered into similar PPAs and amendments with HMSA/HPH, and they also

entered into the Second PPA with HMSA/HPH, and all of these PPAs likewise contained arbitration and "supersedes" clauses identical or substantially similar to the corresponding Dr. Tavakoli/HMSA PPAs and amendments. Dr. Tavakoli/KMSI/UCMI argue, however, that these arbitration clauses were either 1) rendered unenforceable by HMSA/HPH's default; 2) waived by HMSA/HPH when they "elected to pursue their dismissal on the merits prior to relying on arbitration, and engaged in conduct that was completely inconsistent with reliance on an arbitration agreement, both before and after the circuit court granted their motion to compel arbitration"; or 3) unenforceable unconscionable contracts of adhesion.[14] As a matter of law, none of these arguments have merit.

In Christiansen v. First Ins. Co. of Hawaii, Ltd., 88 Hawai'i 442, 455-56 n.17, 967 P.2d 639, 652-53 n.17 (App. 1998), this court stated:

> A party may bring an action in court regarding issues governed by an arbitration clause only if: (1) there is a "default in proceeding with the arbitration," meaning that one party fails to comply with the agreement to arbitrate, Leong v. Kaiser Found. Hosp., 71 Haw. 240, 244, 788 P.2d 164, 167 (1990); Association of Owners of Kukui Plaza v. Swinerton & Walberg Co., 68 Haw. 98, 108, 705 P.2d 28, 35 (1985); and/or (2) a party waives his or her right to enforce the arbitration agreement, such as when his or her actions are "completely inconsistent" with the terms of the contract. Association of Owners of Kukui Plaza, 68 Haw. at 110, 705 P.2d at 36. The Christiansens may have had a valid argument that, because of First Insurance's alleged dilatory tactics during

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[14] HRS § 658-1 (1993) states:

> **Agreement to submit.** A provision in a written contract to settle by arbitration a controversy thereafter arising out of the contract or the refusal to perform the whole or any part thereof, or an agreement in writing to submit an existing controversy to arbitration pursuant to section 658-2, shall be valid, enforceable, and irrevocable, save only upon such grounds as exist for the revocation of any contract.

> the appraisal process, its actions were "completely inconsistent" with the appraisal process and, therefore, First Insurance waived its right to settle the disputed claim through arbitration. However, First Insurance subsequently complied with the terms of the appraisal clause, making the issue of waiver moot.

1. Dr. Tavakoli/KMSI/UCMI contend that HMSA/HPH

> were in default of arbitration based on their 4-year uncured delay and bald pursuit of judgment by [t]he court against claims [Dr. Tavakoli/KMSI/UCMI] submitted for arbitration in 1998 because the evidence . . . was that [HMSA/HPH] delayed and frustrated [Dr. Tavakoli/KMSI/UCMI's] efforts to arbitrate until prospective costs of arbitration added to the cost of attempting to initiate arbitration exceeded the value of the claims, such that [Dr. Tavakoli/KMSI/UCMI] were forced to file the Complaint to preserve those claims."

This "forced to file" contention is contradicted by the rights afforded by HRS § 658-3 quoted above.

2. Dr. Tavakoli/KMSI/UCMI contend that HMSA/HPH waived the arbitration provision when they elected to pursue a dismissal of the case on the merits prior to relying on arbitration, and engaged in conduct that was inconsistent with reliance on the arbitration clause.

This contention is contradicted by the following facts: 1) HMSA/HPH's January 31, 2003 Motion for Judgment on the Pleadings was based on challenges to Dr. Tavakoli/KMSI/UCMI's right to sue, and the first challenge asserted was the fact that Dr. Tavakoli/KMSI/UCMI failed to pursue binding arbitration as required by the PPAs; and 2) HMSA/HPH's January 31, 2003 Motion to Dismiss or to Compel Arbitration asked the court

> (1) to dismiss all claims, based on the binding arbitration and internal appeal procedures set forth in HMSA's Participating Physician Agreements, or (2) in the alternative, to compel individual binding arbitration of all claims in the Complaint which survive this Motion and HMSA and HPH's Motion for Judgment on the Pleadings, and stay all remaining proceedings in this matter, including but not limited to [HMSA/HPH's] obligation to respond to any discovery.

Dr. Tavakoli/KMSI/UCMI further contend that "[t]he circuit court erred by summarily disposing of [Dr. Tavakoli/KMSI/UCMI's] defenses based upon waiver and default, and failing to grant [Dr. Tavakoli/KMSI/UCMI's] demand for a jury trial [on] those issues because material facts were in dispute."

In Leong v. Kaiser Found. Hosp., 71 Haw. 240, 244, 788 P.2d 164, 167 (1990), the Hawai'i Supreme Court explained that

> [t]he word "default" used in [HRS § 658-3] does not pertain to breach or default of performance undertaken in the contract in which an agreement to arbitrate is a covenant." Gregg Kendall & Assocs., Inc. v. Kauhi, 53 Haw. 88, 93, 488 P.2d 13, 140 (1971)) (brackets omitted). As used in § 658-3, default means a failure to comply with the agreement to arbitrate. The 'trial' referred to in HRS § 658-3 is limited to issues of whether the parties ever agreed to arbitrate or whether there is a default in compliance with such an agreement. . . .
>
> The Leongs are entitled to a jury trial under HRS § 658-3 only if there are disputed factual issues relating to whether there is an enforceable agreement to arbitrate. When there are no factual issues to resolve, the inquiry is simply one of law.

(Some citations omitted.)

The circuit court judge concluded "that the arbitration agreement in question . . . is a signed agreement, and I am satisfied is a valid and binding agreement and enforceable." We agree. Moreover, the position now taken by Dr. Tavakoli/KMSI/UCMI that "material facts were in dispute" is contrary to the position Dr. Tavakoli/KMSI/UCMI stated in the circuit court. At the March 28, 2003 hearing, counsel for Dr. Tavakoli/KMSI/UCMI stated as follows:

> First, your Honor, [Dr. Tavakoli/KMSI/UCMI] don't contend that there are any material facts in dispute with respect to [HMSA/HPH's] motion to dismiss or compel arbitration.
>
> But in the event that the Court determines that a trial is warranted, under 658-3, which is the statute the parties agreed to

> arbitrate under, [Dr. Tavakoli/KMSI/UCMI] would like the record to reflect that we demand a trial before a jury.

3. A "contract of adhesion" "is drafted or otherwise proffered by the stronger of the contracting parties on a 'take it or leave it' basis[.]" Brown, 82 Hawai'i at 247, 921 P.2d at 167. A contract of adhesion

> is unenforceable if two conditions are present: (1) the contract is the result of coercive bargaining between parties of unequal bargaining strength; *and* (2) the contract unfairly limits the obligations and liabilities of, or otherwise unfairly advantages, the stronger party. Arbitration agreements are not usually regarded as unenforceable contracts of adhesion because the second condition is generally lacking -- that is, the agreement bears equally on the contracting parties and does not limit the obligations or liabilities of any of them, but merely substitutes one forum for another.

Id.[15] (Internal quotation marks and citations omitted.)

In their motion for reconsideration, HMSA/HPH contend that (a) the PPAs in this case are not contracts of adhesion because the record "shows physician negotiations and amendments to the PPAs that are not consistent with an adhesion contract" and (b) "there is no need for the Court to reach the issue of whether the PPAs are contracts of adhesion, because they are enforceable regardless[.]" We conclude that the record is clear that the PPAs are contracts of adhesion. The question is whether they are enforceable contracts of adhesion.

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[15] The degree to which a contract of adhesion is "unenforceable" may be a matter of degree depending on the relevant facts and circumstances. The Hawai'i Supreme Court has stated that, as a remedy, "some courts look past the wording of the contract and consider the entire transaction in order to effectuate the reasonable expectations of the parties." Leong v. Kaiser Found. Hosp., 71 Haw. 240, 247-48, 788 P.2d 164, 168-69 (1990) (quoting Robin v. Blue Cross Hosp. Serv., Inc., 637 S.W.2d 695, 697 (Mo. 1982)). Another authority states that an insurance policy is a contract of adhesion and the remedy is that "an insurance policy is liberally construed in favor of the insured[.]" 43 Am. Jur. 2D Insurance § 185 (2003).

In this appeal, we are not concerned with the entire content of the Third PPA. We are concerned only with the arbitration provision. We conclude that it is enforceable. The arbitration clauses of the PPAs state that if Dr. Tavakoli has complaints that are not resolved through internal appeal, the parties will submit to binding arbitration, not litigation. The clauses do not limit the obligations of any party; they simply replace adjudication with arbitration. Brown, 82 Hawai'i at 247, 921 P.2d at 167.

B. Applicability of an Arbitration Agreement

1. Dr. Tavakoli/KMSI/UCMI assert that KMSI and UCMI are not subject to the arbitration provision in the PPAs "and it was not shown that [Dr. Tavakoli] had authority to bind them to arbitration." We agree.

2. The arbitration clause in Section 8.3 of the Third PPA broadly asserts that

> any and all claims, disputes, or causes of action arising out of this Agreement or its performance, or in any way related to this Agreement or its performance, including but not limited to any and all claims, disputes, or causes of action based upon contract, tort, statutory law, or actions in equity, shall be resolved by binding arbitration as set forth in this Agreement.

Dr. Tavakoli/KMSI/UCMI argue that this clause applies only to disputes arising from the First PPA and the Third PPA, but not to disputes that arose during the approximately twenty-month period between the First and Third PPAs, or after the Third PPA was terminated. This argument applies to Dr. Tavakoli. It does not apply to associate physicians of KMSI/UCMI who entered into the Second PPA. HMSA/HPH counter that courts construe broad

arbitration clauses so as to include events arising prior to and subsequent to the agreement concerning the same subject matter, unless expressly excluded. We agree with HMSA/HPH.

The United States Supreme Court articulated that the "parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship." Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO, 430 U.S. 243, 255, 97 S.Ct. 1067, 1074 (1977). "[W]here the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication." Id. Therefore, if a dispute arose before the Third PPA began or after it expired, the arbitration provision of the Third PPA would still apply to the dispute so long as 1) the dispute arose from or was related to the Third PPA, and 2) the presumption for arbitrability in the provision was not "negated expressly or by clear implication."

In their motion for reconsideration, HMSA/HPH note that "[t]he Second Circuit's Order makes it clear that while KMSI and UCMI's claims are subject to the arbitration provision, it is the individual physicians who must pursue those claims in arbitration." (Footnote omitted.) More clearly stated, the Second Circuit Court ruled that the claims asserted by plaintiff corporations KMSI and UCMI (which are parties to this action but

are not parties to the arbitration agreement) "are stayed pending final resolution of any individual arbitration proceedings" initiated by individual physicians (who are parties to the arbitration agreement but are not parties to this action).

We conclude that the only claims in this case are the claims asserted by Dr. Tavakoli/KMSI/USMI. As noted above, section 9.2 of the Third PPA prohibits assignment or transfer or "rights, duties, or obligations under this Agreement without the prior consent of the other party." There is no indication of such consent. Therefore, KMSI and UCMI may not pursue any rights that they obtained by assignment from the individual physicians. Other than Dr. Tavakoli, no individual physicians are parties to this action. Therefore, this action cannot be stayed pending actions or inactions by them.

On the other hand, KMSI and USMI may pursue any rights that they did not obtain by assignment from the individual physicians, and Dr. Tavakoli may pursue any rights that do not arise out of and are not in any way related to the Third PPA.

Although the record indicates that not all of the various causes of action stated in Dr. Tavakoli/KMSI/UCMI's complaint arise out of or are related to the PPAs, the record does not reveal all of the facts necessary to determine which claims are or are not included in these categories. Consequently, we will leave to the circuit court the task of deciding this question. To facilitate this process, we suggest

that Dr. Tavakoli/KMSI/USMI file an amended complaint clearly stating these claims.

C. Right to Trial by Jury

Dr. Tavakoli/KMSI/UCMI contend that "[t]he circuit court erred by denying [Dr. Tavakoli/KMSI/UCMI's] demand for a jury trial because it prevented them from discovering additional evidence to support their defense of unconscionability because there was evidence before the court suggesting the arbitration provision was one-sided by design." As noted above, the Second Amendment states, in Section 8.3, that "[t]he arbitration shall be conducted by a single arbitrator in accord with the rules of the arbitration service selected above and Hawaii Revised Statutes, Chapter 658." We are unaware of anything that precludes the arbitrator from ordering reasonably necessary discovery.

Dr. Tavakoli/KMSI/UCMI also contend that "[t]he circuit court erred by summarily disposing of [Dr. Tavakoli/KMSI/UCMI's] defenses based upon waiver and default, and failing to grant [Dr. Tavakoli/KMSI/UCMI's] demand for a jury trial [on] those issues because material facts were in dispute."

In Leong, the Hawai‘i Supreme Court explained that "the word 'default' used in [HRS § 658-3] does not pertain to breach or default of performance undertaken in the contract in which an agreement to arbitrate is a covenant." 71 Haw. at 244, 788 P.2d at 167 (quoting Gregg Kendall & Assocs., 53 Haw. at 93, 488 P.2d at 140) (brackets omitted). "As used in § 658-3, default means a

failure to comply with the agreement to arbitrate. The 'trial' referred to in HRS § 658-3 is limited to issues of whether the parties ever agreed to arbitrate or whether there is a default in compliance with such an agreement." Id. (Citations omitted). Therefore, a party is entitled to a jury trial under § 658-3 only "if there are disputed factual issues relating to whether there is an enforceable agreement to arbitrate. When there are no factual issues to resolve, the inquiry is simply one of law." Id. (Citation omitted).

Here, as noted above, Dr. Tavakoli/KMSI/UCMI expressly admitted in the circuit court that no such factual dispute existed. In fact, at the March 28, 2003 hearing on the Motion for Judgment on the Pleadings and the Motion to Compel Arbitration, counsel for Dr. Tavakoli/KMSI/UCMI stated as follows: "First, your Honor, [Dr. Tavakoli/KMSI/UCMI] don't contend that there are any material facts in dispute with respect to [HMSA/HPH's] motion to dismiss or compel arbitration."

The circuit court concluded that the arbitration agreement was "signed, valid, binding and enforceable in all respects." We agree.

CONCLUSION

Accordingly, regarding the Second Circuit Court's April 17, 2003 "Order Granting in Part and Denying. . . in Part Defendants Hawaii Medical Service Association's and Health Plan Hawaii's Motion to Dismiss or . . . to Compel Individual Arbitration and Stay All Proceedings Filed January 31, 2003", we

vacate and remand for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, October 5, 2005.

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James A. Burns
Chief Judge

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Associate Judge